



# Ho-Chunk Nation Gaming Commission

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December 15, 2006

VIA FACSIMILE (202) 632-0045

The Honorable Phil Hogan, Chairman  
National Indian Gaming Commission  
1441 L Street, N.W., Suite 9100  
Washington, D.C. 20005

## RE: Comments on the Potential Economic Impact of Proposed Changes to Class II Regulations

Dear Chairman Hogan:

The Ho-Chunk Nation ("Nation") Gaming Commission is providing comments on the Potential Economic Impact of Proposed Changes to Class II Regulations proposed by the National Indian Gaming Commission ("NIGC" or Commission") at 25 C.F.R. Parts 502 and 546. The NIGC's proposed regulations concern Class II definitions, gaming standards and classification standards.

As you know from our prior comments, we are very concerned about the regulations you have proposed for Class II gaming. Of all the tribes in Wisconsin, the Nation stands to lose the most if these regulations go into effect. We have tried to impart this message to you at our consultation meeting on July 17, 2006 in Bloomington, Minnesota. The same conclusion was reached more recently on November 3, 2006 in the Analysis Group economic impact study requested by the NIGC. The Nation also noted our concerns in our comment letter dated November 15, 2006. Quite honestly, the Nation's Class II gaming facility ("DeJope") in Madison, Wisconsin would have no compliant machines if the NIGC's regulations go into effect. We are providing more detailed comments on the economic impact study in order to demonstrate the real consequences of these proposed regulations for the Nation.

Since the study conducted by the Analysis Group expressly declined to consider the economic impact of the NIGC's proposed technical standards in 25 CFR Part 547, the Nation reserves the right to comment later on the negative impacts of those regulations. The Nation understands that the NIGC will be accepting comments on Part 547 through January 31, 2007.

## OPTIONS FOR THE NATION'S EXISTING CLASS II GAMING MACHINE OPERATION

On November 3, 2006, the Analysis Group submitted a report entitled *The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations*. The report identified three

potential options for tribes currently operating Class II gaming machines: shut down, adopt compliant gaming machines and adopt an alternative. See Analysis Group Study (page 9). We examined each option as it applies to the Nation.

**Shut down** – If the NIGC's proposed regulations for Parts 502 and 546 go into effect, the Analysis Group estimated a 57% decline in Class II machine revenue *per day*. This, by itself, would likely result in insufficient revenue for DeJope to cover its variable costs of operation. Therefore, a facility shut down is the most likely option should the currently proposed regulations go into effect and are found to be legally enforceable.

**Adopt compliant gaming machines** – As noted in the Analysis Group report, the Nation may attempt to conduct Class II gaming operations with machines that are compliant with the proposed regulations. This option would not only cause DeJope to become, at best, a marginally profitable enterprise on an ongoing operational basis; it would also require DeJope to overcome the capital burden that would be required to modify or acquire compliant Class II gaming machines. The process of waiting for Class II manufacturers to develop a substitute Class II game, then to have it certified by the Chairman, would only compound the financial harm to DeJope and the Nation. Even assuming a compliant Class II game is procured, it will be less entertaining, less marketable, and less profitable to DeJope. In the long run, there would be no practical financial alternative but to discontinue Class II gaming operations.

**Adopt an alternative** – The Nation currently has no ability to adopt an alternative such as Class III games or gaming machines at DeJope. Per an amendment to its compact, the Nation can only operate Class III gaming at this facility if the governor of Wisconsin is given authorization by voter referendum or passage of a local city council resolution. (See Analysis Group Study (page 31). A voter referendum to authorize Class III gaming at DeJope was held on February 17, 2004. The referendum was soundly defeated by a 64% to 36% margin. As there is no likelihood of Class III gaming being permitted at DeJope in accordance with the Nation's current gaming compact, the option to adopt an alternative is not possible.

## **THE DIRECT ECONOMIC IMPACT ON DEJOPE AND THE NATION**

In light of the effects of the proposed Class II regulation changes and the option(s) available to the Nation, we expect the following negative economic impacts to occur:

- Lost gaming revenue;
- Lost non-gaming revenue;
- Decreased variety and quality of Class II machines;
- Temporary and/or partial gaming facility closures;
- Lost tribal government revenue;
- Increased costs;
- Lost jobs; and
- Infringement upon Tribal Sovereignty

### **(1) Lost Gaming Revenue**

In October 2005, well before the Commission first issued its proposed regulations in May 2006, the Nation received a study assessing the feasibility of expanding the DeJope facility.

The study, prepared for the Nation by the Innovation Group, recommended expanding to 1,125 Class II gaming machines. Subsequent to receipt of the Innovation Group report, the Nation embarked upon an expansion program for DeJope that is to result in a total of 1,137 Class II gaming machines (compared to 346 Class II machines at the end of September 2006). The Nation has entered into binding agreements with Class II gaming vendors to support this expansion, and the machines will be in place by January 1, 2007.

We expect that the total amount of gaming revenue that would be lost would be directly proportional to the amount of time DeJope would be shut down. The feasibility study estimated DeJope's gross gaming revenues to be approximately \_\_\_\_\_ for calendar year 2007 and steadily rising to \_\_\_\_\_ by calendar year 2011 (see table below). However, this figure is jeopardized if the NIGC's currently proposed regulations become reality. Thus, the total five year estimated loss of gaming revenues would be in excess of \_\_\_\_\_.

	2007	2008	2009	2010	2011
Gross gaming revenue					

## (2) Lost Non-Gaming Revenue

Because DeJope's non-gaming revenues are entirely dependent upon the presence of gaming patrons and the gaming facility in order to derive a revenue stream, the entirety of non-gaming revenues would be lost if, as expected, DeJope was forced to shut down in response to the proposed Class II regulations.

As with the gaming revenue, we expect that the total amount of non-gaming revenue that would be lost would be directly proportional to the amount of time DeJope would be shut down. Non-gaming revenues for DeJope are estimated to be approximately \_\_\_\_\_ for calendar year 2007 and are expected to rise to \_\_\_\_\_ by calendar year 2011 (see table below). The total five year estimated loss of non-gaming revenues would be excess of \_\_\_\_\_.

	2007	2008	2009	2010	2011
Non-gaming revenue					

In order to determine an estimate for lost non-gaming revenue for DeJope, non-gaming revenue as a percentage of gross gaming revenues for fiscal year 2006 was calculated. The gross gaming revenues projected in the feasibility study was then multiplied by this percentage to arrive at an estimate of lost non-gaming revenue. The actual percentage of non-gaming revenues at DeJope may be expected to rise following completion of the current expansion program as the greater traffic flow may provide for additional non-gaming revenue opportunities that are not financially feasible with existing levels of patron counts. As a result, the estimated figure may understate the impact of the NIGC's proposed Class II regulations.

## (3) Decreased Variety and Quality of Class II Machines

As noted in the Analysis Group study, the proposed Class II regulations are likely to decrease demand for Class II machines. Compliant Class II machines are likely to be less appealing to patrons and generate less revenue. A decrease in demand may result in higher costs per Class II machine. Some manufacturers may no longer find it profitable to stay in the market. And a

decrease in competition among manufacturers would likely lead to a decrease in the variety and/or quality of Class II machines. See Analysis Group study (page 13).

#### **(4) Temporary and/or Partial Gaming Facility Closures**

Given that no existing Class II machines meet the proposed regulation changes, the Nation would be required to modify and/or replace every Class II machine currently in operation. Should the Nation decide to continue Class II gaming operations at DeJope by adopting compliant gaming machines, it is quite likely that at least a temporary shut down would be required. The proposed regulation changes give tribes six months to become compliant. However, the amount of time required for development, testing, certification and installation of compliant machines has been consistently estimated as requiring 12 to 24 months to accomplish. Even then, certification of the Class II machine is not guaranteed. This time frame to become compliant would require the Nation to cease its Class II gaming machine operations for a period of six to 18 months.

#### **(5) Lost Tribal Government Revenue**

Because Class II gaming revenues are transferred from DeJope to the Nation's government, any decrease in revenue at the facility will lead to a corresponding decline in tribal government revenue. This decrease in tribal government revenue would translate into a decrease of funds available for funding of tribal government operations, programs and services, per capita payments, economic development of other tribal enterprises, donations to local charities and the funding of the operations of local government agencies.

Figures provided in the feasibility study reveal the extent to which the Nation would be harmed should the Commission's proposed Class II gaming regulations be implemented and enforced. This independently compiled study calculated the net Earnings Before Interest, Depreciation, Taxes and Amortization (EBITDA) gain to the Nation that would be provided by continuous operations of the expanded DeJope facility. Net EBITDA gains to the Nation are estimated to be approximately \_\_\_\_\_ for calendar year 2007 and are expected to increase to \_\_\_\_\_ by calendar year 2011. The total five year estimated declines in net EBITDA to the Nation would be nearly \_\_\_\_\_.

	2007	2008	2009	2010	2011
Net EBITDA gains					

#### **(6) Increased Costs**

Currently, no Class II gaming machines would meet the requirements of the proposed regulation changes. Accordingly, there are a number of potential new or additional costs that the Nation may have to incur as a result of the proposed Class II regulation changes. These costs include, but are not limited to: capital, regulatory, training and financing costs.

The capital costs required to upgrade and/or replace existing Class II gaming machines to achieve compliance with the proposed regulations are certain to be significant. Those manufacturers that remain in the Class II gaming machine market will undoubtedly shift some of their costs onto the Nation. Additionally, the Nation is in the process of completing a major

renovation of the DeJope Class II facility at a cost of approximately \$1.5 million. The bulk of the capital expended for this renovation would effectively become an unrecoverable sunk cost.

Regulatory costs to comply with the proposed regulations would also be substantial. Initial or one-time costs such as the development of new tribal regulations would be incurred by the Nation. The Nation would be further burdened with ongoing regulatory costs, such as increased auditing costs, if the Nation chooses to continue Class II gaming at DeJope by adopting compliant Class II gaming machines.

In addition to the training costs that would be required for the Nation's current employees, the costs to hire and train new employees must be considered. These costs, from advertising, interviewing, new employee orientation, etcetera, are substantial. As previously noted, the Commission's proposed regulations would require DeJope to cease its Class II gaming machine operations for a period of six to 18 months. If the Nation chose to recommence Class II gaming operations with compliant gaming machines, a substantial number of employees would likely be unwilling or unable to return to employment at DeJope. Depending on the number/type of new employees that would be required, the new employee training costs alone would almost certainly be several hundred thousand dollars, and quite probably in excess of \$1 million.

Furthermore, the Nation would also bear the costs of lost human capital arising from the departure of its employees with valuable gaming experience and institutional memory.

Financing costs to the Nation will be subject to an upward bias as capital markets will demand increased fees and/or interest rates for credit in order to compensate for the significantly smaller and less diversified source of governmental revenue that would be available to the Nation.

#### (7) Lost Jobs

According to the feasibility study conducted for the DeJope facility would employ a staff of 280 full-time equivalent positions to conduct continuous operations. For the most recent period in which data is available, DeJope employed a total of 115 people (see table below). Of this total, 27 were members of the Nation and a similar number are from minority/underrepresented populations. With continuous operations employing 280 persons as envisioned by the feasibility study, the number of employees that are members of the Nation would total 66 if the proportion remains constant. A shut down would eliminate essentially all of these positions.

Department	Total Employees	Ho-Chunk Employees	Other Employees
Cage	19	2	17
Count Team	3	0	3
Executive	4	3	1
Finance	4	1	3
Food & Beverage	10	1	9
Maintenance	15	4	11
Marketing	10	1	9
Security	19	5	14
Slots	11	2	9
MIS	4	1	3



Personnel	1	1	0
Purchasing	2	1	1
Revenue Audit	4	0	4
Surveillance	9	5	4
Total	115	27	88

#### (8) Infringement Upon Tribal Sovereignty

To say that the NIGC's proposed regulations would negatively impact the DeJoep facility, doesn't come close to stating the full impact on the Ho-Chunk Nation. In fact, as pointed out in the Analysis Group report, the DeJoep facility is the only one in the entire state of Wisconsin that will be impacted. Of course, the Analysis Group study reports only 361 Class II gaming machines at DeJoep. But by time the NIGC's regulations go into effect, DeJoep will be operating over 1,000 such machines. This would make DeJoep's closure even more harmful.

When the federal agency tasked with the legal obligation to implement the provisions of the IGRA does so by adopting Class II regulations that stall tribal economic development, tribal self-sufficiency, and strong tribal government, it acts contrary to Federal Indian policy. In this case, it does so knowing the specific impact on one particular tribe. So while the NIGC can try to distinguish the impact of its proposed regulations under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act (see 71 Fed. Reg. 30253), it cannot claim that these regulations promote tribal economic development for either the Ho-Chunk Nation or the DeJoep facility. Knowingly advancing such an agenda infringes on the Nation's sovereignty, which in the realm of Class II gaming, was meant to be retained by tribes. This point was stressed in Senate Report 555, where it was clearly noted that "tribal jurisdiction over Class II gaming has not been previously addressed by Federal statute and thus there has been no divestment or transfer of such inherent tribal government powers by Congress." S. Report at 11. Add to this the fact that primary jurisdiction over bingo was to remain with tribes and that IGRA was not to be construed in a manner that abrogated tribal rights. Is this really how a federal agency with a Trust relationship to the Nation should proceed? We think not.

Based upon the proceeding, we hereby request that the NIGC refrain from adopting these regulations. At the very least the NIGC should enter into specific consultations with the Nation regarding the impact on DeJoep.

Respectfully,

*Sharon Whitebear*

Sharon Whitebear, Chairperson  
Ho-Chunk Nation Gaming Commission

Cc: George Lewis, HCN President  
Wade Blackdeer, HCN Vice President  
Sheila Corbine, Attorney General  
FileDEC011 Comments on Economic Impact

**HO-CHUNK NATION GAMING COMMISSION**

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**FACSIMILE  
COVER SHEET****To:** Honorable Phil Hogan, NIGC**Date:** 12-15-06**Dept:** \_\_\_\_\_**Fax #:** 202-632-0045**cc:** \_\_\_\_\_**Re:** Comments on Economic Impact of  
Proposed Changes to Class II Regulations**This transmission consists of** 7  
**pages, including this cover sheet.****From:** Joan Buckhannon, Exec. Adm. Assist.**RECORD OF FACILITY TRANSMISSION TO:**☐ DeJope    ☐ Ho-Chunk    ☒ Ho-Chunk    ☐ Majestic Pines    ☐ Rainbow    ☐ State of Wisconsin  
☐ Other \_\_\_\_\_**ATTENTION**☐ URGENT    ☐ REPLY ASAP    ☐ PER YOUR REQUEST    ☐ FOR YOUR REVIEW    ☐ FYI**COMMENTS:**☒ Hard copy to follow.    ☐ Hard copy will NOT be forwarded unless requested.**If you have any questions regarding this material, or if all pages were not received, please call our office at (715) 284-7474.****THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS NAME ABOVE!**

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